Date: 20091120

Docket: IMM-677-09

Citation: 2009 FC 1194

Ottawa, Ontario, November 20, 2009

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

BETHANY LANAE SMITH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The applicant, Bethany Lanae Smith, is a 21-year old American citizen who claims refugee protection pursuant to ss. 96 and 97(1) of the *Immigration and Refugee Protection Act* ("*IRPA*"). She is a homosexual member of the U.S. Army, from which she has deserted. She alleges a fear of persecution on the part of her colleagues and superiors because of her sexual orientation. She also claims she would be personally facing a risk to her life or cruel and unusual treatment or punishment if she were returned to the United States.

[2] Her claim was rejected by the Refugee Protection Division of the Immigration and Refugee Board (the "RPD") in a decision dated February 2, 2009, on the ground that she had failed to seek state protection which would have been adequate. Having thoroughly reviewed the applicant's record, as well as the oral and written submissions of both parties, I have come to the conclusion that this application for judicial review ought to be allowed. Here are my reasons in support of that conclusion.

BACKGROUND

[3] The applicant was born in Texas in 1988. At the age of 16, her father discovered her sexual orientation and threw her out of his home. She then moved to Oklahoma to live with her mother.

[4] After completing her education, she held various jobs before deciding to join the Army to make a better life for herself. She was promised by the recruitment officer that the Army would pay for her college education and that she would have the opportunity to travel the world. She accepted the offer.

[5] In September 2006, she passed the physical, medical and aptitude tests. When she met with occupation personnel at the Military Entry Program Services, she made it clear that she did not want to engage in combat. She enlisted for three years as a mechanic. Her contract stipulated that she had no right to cancel it, although the Army could do so at any time. It also contained a waiver of the "conscientious objector" status.

[6] The applicant alleges that, since the recruitment process involved a considerable amount of paperwork, she did not have an opportunity to read the contract itself. She also claims that when she enquired about the meaning of the phrase “conscientious objector”, she was told that it was not important and that she should simply fill out the forms. She also claims that she did not know about the “Don’t Ask, Don’t Tell” policy towards homosexuals in the Army.

[7] In March 2007, she was sent to Fort Campbell in Kentucky and worked there as the only female mechanic in the motor pool. She was harassed and insulted by other soldiers because she had the appearance of a lesbian. The situation worsened when she was seen holding hands with another woman in a public place. When her superiors became aware of this situation, they started treating her harshly and giving her assignments that were incompatible with her medical condition. She also received hundreds of handwritten notes that were posted on her dormitory door, containing threats of beatings. In early June, she was particularly frightened by one note whereby she was threatened to be murdered in her sleep.

[8] The applicant did not tell anyone about the notes, because she did not know whom she could trust and whether she would be talking to authors of the notes. She did not confront her superiors either, because they had treated her badly after rumours circulated about her sexual orientation. She thought that they would not do anything to help her and she feared that higher ranking officers were also behind those acts of harassment. She alleges that she destroyed all the notes.

[9] During one of her medical examinations, she told the medical examiner about a soldier who had grabbed her and thrown her to the ground. She did not disclose to the doctor that she was gay. He brushed off the incident as simple horseplay on the part of companions-in-arms.

[10] The applicant feared that the death threat in the note she had received in early June could become reality since, down the hall from her room, was the supplies room where the keys to all the rooms were kept. She tried to obtain a discharge by frankly revealing to her superiors that she was a lesbian. Her request was denied and the Sergeant ordered her not to speak to officers of higher rank about it.

[11] There is no evidence that the applicant applied for conscientious objector status. This issue appears to have been raised only at the time of her hearing before the Board, since nothing is mentioned in that respect in her Personal Information Form ("PIF").

[12] On September 9, 2007, fearing that her life was in danger, she fled from the base with another soldier. After leaving the base, the applicant received an anonymous call, apparently from her base, threatening to "kick a hole in her face" if she returned to Fort Campbell. Another soldier from the base apparently sent her a text message saying that she deserved to be killed for deserting the unit.

[13] The applicant entered Canada on September 11, 2007 and filed her refugee claim on October 16, 2007.

THE IMPUGNED DECISION

[14] The RPD did not question the applicant's sexual orientation and found that she was a gay person. The Board Member also recognized that harassment and violence against lesbian and gay service members have been a source of concern. Reviewing the administrative and regulatory prohibitions on military service by lesbian, gay and bisexual persons since World War I, the Board Member then summarized briefly the compromise solution better known as the "Don't Ask, Don't Tell, Don't Pursue" policy that has been officially followed since 1993. That policy, to which was added a directive explicitly banning harassment of lesbian and gay military personnel, was intended to ease the ban on homosexuals in the military. It distinguished between "being gay" and "acting on being gay", allowing gay people to serve in the military provided that they did not engage in homosexual conduct. As recognized by the Board Member himself, this policy has had mixed results:

> 38. Some scholars have challenged the basis of the "Don't Ask, Don't Tell, Don't Pursue" policy, as not offering protection to gay or lesbian military personnel from harassment or scrutiny. The success of its translation into practices that curb such harassment has been unclear and "[…] and reports since the adoption of the plan suggest that sexual-orientation-base harassment continues to exist in the military […] from derogatory terms against lesbian and gay persons used in military training programs to incidents of severe violence," such as in the 1990 murder of Barry Winchell, a soldier who was believed to be gay and who was beaten to death by a baseball bat while he was asleep.
> [It is worth noting that Private Winchell was murdered in 1999, not in 1990, at Fort Campbell, the very base where the applicant was posted]

[15] The Board Member ruled, on the basis of two decisions of this Court (*Sadeghi-Pari, Fariba v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 282, and *Dosmakova, Sofya v.*

Canada (Minister of Citizenship and Immigration), 2007 FC 1357) that a lesbian belongs to a particular social group for the purposes of the phrase "Convention Refugee" and referred to a guidance note prepared by the United Nations Refugee Agency (UNHCR) on sexual orientation and gender identity. He noted, in particular, that "there is no duty to be "discreet" or to take certain steps to avoid persecution, such as living a life of isolation, or refraining from having intimate relationships" (para. 57). He then reviewed the documentary evidence provided by the applicant about the situation of homosexuals in the U.S. Army.

[16] According to the RPD, there are two determinative issues in this case: first, whether the acts of harassment and discrimination, even if not amounting to persecution individually, cumulatively constitute persecution, and 2) whether the claimant has offered clear and convincing proof of the state's inability or unwillingness to protect her.

[17] As to her first claim, the applicant had to show that the U.S. Uniform Code of Military Justice ("UCMJ") would be applied to her in a discriminatory fashion or that the application thereof would result in cruel and unusual treatment or punishment. For that purpose, she invoked the affidavit of Donald G. Rehkopf Jr., an attorney who has 32 years of military law experience as a prosecutor, defence counsel and acting Staff Judge Advocate. In essence, his testimony is to the effect that the U.S. military judicial system is unfair to, and biased against homosexuals and soldiers who go on Absence With Out Leave ("AWOL"). In his view, the court-martial process is stacked in favour of the prosecution. On the basis of the information he received from the applicant's counsel, he opined that the applicant is in all probability facing a sentence of imprisonment of at least three

years if deported to the U.S.; in that respect, he goes even much further than appellants' counsel in *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 (as reported at para. 40 of that decision), who had submitted that deserters face one to five years in prison. Citing the American case law, Mr. Rehkopf is of the view that life imprisonment is a "practical and legal" punishment for deserters in time of war.

[18] Mr. Rehkopf also asserted that the applicant cannot effectively defend herself against a charge of desertion. If Ms. Smith were to plead mitigating circumstances (e.g. by arguing that her desertion was due to scruples of conscience against war even though she had failed to obtain her discharge as a conscientious objector), she could make a convincing case only by disclosing her true reasons for leaving the Army. She would then find herself in deeper trouble, considering the climate of prejudice against, the harassment and indeed the threats directed at military members who are perceived as being non-heterosexual. Should she assert that her superiors ignored the threats made against her, the military authorities will, in effect, punish her for revealing a very embarrassing truth about the military. Moreover, she could face additional criminal charges for having had sexual relations with a person of the same sex, in violation of Article 120 ("indecent act") or Article 125 ("sodomy") of the UCMJ.

[19] In short, Mr. Rehkopf believes that although the U.S. Army are able to protect the claimant, they are not willing to do so because of their hostility and bias against lesbians and gays. Considering the anti-gay/lesbian climate at Fort Campbell, finding fair and open-minded jurors on

her court martial panel will be next to impossible, in his view, because anyone who showed sympathy for her position would be challenged by the prosecution.

[20] The Board rejected Mr. Rehkopf's opinion and found it to be not credible. First, it determined that it was based on a number of assumptions that were speculative at best. Moreover, the Board Member noted that there is no evidence that a defence counsel has ever challenged the "Don't Ask, Don't Tell" policy on the basis of a Supreme Court decision invalidating a Texas statute making it a crime for two adults of the same sex to engage in consensual sodomy (*Lawrence v. Texas*, 539 U.S. 538 (2003)). It is not clear what inference is to be drawn from this observation; the Board Member may be suggesting that Articles 120 and 125 of the UCJM could well be declared unconstitutional if challenged on behalf of the applicant.

[21] The Board Member also found that the Winchell murder was an isolated incident, and added that he "suspected" the perpetrator(s) must have been sentenced to a lengthy term of imprisonment and subjected to other severe penalties. As a result, he rejected Mr. Rehkopf's opinion that there is clear and convincing evidence of the state's inability to protect the claimant.

[22] The Board also viewed the applicant's situation as not distinguishable from that of Mr. Hinzman, because both of them had formally claimed "conscientious objector" status and were reluctant to engage in combat. In this respect, the Board did not accept as credible the applicant's evidence that she did not know what that phrase meant. On the contrary, the Member found that the applicant voluntarily enlisted in the U.S. Army, and just like Mr. Hinzman developed an objection

to the war in Iraq after having spent some time in the military. The Board Member determined that there is no internationally recognized right to be a conscientious objector with respect to a specific war (except in the specific cases provided for in paragraph 171 of the UNHCR Handbook). The fact that the claimant may face prosecution upon return to the United States did not reveal a failure of state protection or persecution on the basis of political opinion.

[23] The Board Member also rejected Mr. Rehkopf's assessment of the court-martial process as being biased, preferring to follow the Federal Court and the Federal Court of Appeal which have both determined that the UCMJ as a law of general application, was not applied in a discriminatory fashion.

[24] In concluding that prolix part of his reasons, the Board Member questioned the credibility and expertise of Mr. Rehkopf. Referring to his statement that he has served as a prosecutor, defense counsel and Acting Staff Judge Advocate and tried more than 225 cases, the Member challenged Mr. Rehkopf's honesty, and wondered how he could persist in prosecuting deserters if he was so concerned about the inequities and unfairness of the military justice system.

[25] Commenting next on the disparities of sentences imposed by the Court Martial, the Board Member noted that the requirement of uniformity has been abolished by the Court in 1959 (*United States v. Mamaluy*, 27 C.M.R. 176 (1959)); it was recognized that consideration must given to the individualized circumstances of the offenders. That being said, the Court of Criminal Appeals is expected to ensure a minimal degree of uniformity in relation to sentencing, and Articles 85 and 86

of the UCMJ set maximum punishment for desertion and AWOL in various circumstances. Such a system allows deserters to be treated uniformly and to be spared any vindictiveness on the part of the sentencing authority.

[26] The Board Member also noted that the applicant waited a little more than one month to file her refugee claim. In his view, that delay was inconsistent with the situation of a refugee fleeing for her life and with probable knowledge that Canada was a refuge for other members of the U.S. military who had preceded her. While this was not held to be a determinative factor, it was nevertheless taken into account as a factor relevant to the assessment of her subjective fear.

[27] Finally, the Board reiterated that an applicant is required to seek the protection of her or his state where it might reasonably be forthcoming. In the case at bar, the applicant spoke to the First Sergeant but did not make any attempts to seek help from higher authorities in her unit. The Member dismissed her explanation that higher ranking officers were involved in the harassment that she had suffered, characterizing this allegation as mere speculation. As for the argument that the military criminal code discriminates against gays and lesbians and that the punishment would be the result of an unfair process, it was also rejected on the basis of the *Hinzman* decision. The Board Member refused to comment on the military court-martial system or on the "Don's Ask, Don't Tell" policy, found that there was no credible evidence that the applicant would not receive a fair hearing or would receive a more severe sentence because she is gay if she were to be prosecuted before a court-martial, and relied on the evidence accepted in *Hinzman* that 94% of deserters have been dealt with administratively and merely received a less-than honorary discharge from the military. Finally,

the Board Member referred to newspapers articles according to which President Obama is about to repeal the “Don’t Ask, Don’t Tell” policy and inferred that the “ammunition” currently used by prosecutors in U.S. court-martials, in situations similar to that of the applicant, will then also be “swept away”.

[28] In conclusion, the Board summed up its findings in the following paragraphs:

> 209. Having considered all of the evidences and the submissions of the claimant’s counsel, I determine that the claimant has failed to present “clear and convincing” proof of the inability of the United States to protect her.
>
> 210. I also determine that the claimant has not satisfied her burden of establishing a serious possibility of persecution on a Convention ground or that it is more likely she would be tortured or face a risk to her life or risk of cruel and unusual treatment or punishment upon return to the United States.
>
> 211. A given episode of mistreatment may constitute discrimination or harassment, yet not be serious enough to be regarded as persecution. Indeed, a finding of discrimination rather than persecution is within my jurisdiction. I find that the acts of harassment and intimidation and written threats made against the claimant do not constitute persecution in this particular case.

[29] As a result, the Board Member ruled that the applicant was not a “Convention” refugee under section 96 of the *IRPA* or a “person in need of protection” within the meaning of section 97(1)*(a)* and *(b)* of the same Act.

ISSUES

[30] Counsel for the applicant has raised a number of issues, which can be summarized as follows:

a. Did the Board Member err in determining that state protection would be available for the applicant? That question must be broken down into the following sub-questions :

   i) Did the Board Member err in finding that the applicant did not seek state protection?

   ii) Did he make a speculative finding when he concluded that the murder of Private Winchell was an isolated incident?

   iii) Did he rely on extrinsic evidence taken from the decision of the Federal Court of Appeal in *Hinzman* without giving the applicant an opportunity to respond?

b. Did the Board Member err in determining that the Uniform Code of Military Justice as a law of general application, is not applied in a discriminatory fashion, that the applicant would receive a fair hearing and that she would therefore be submitted to prosecution and not to persecution? In coming to that conclusion, did the Board Member err in not providing reasons as to why the expert evidence submitted on behalf of the applicant was not credible?

ANALYSIS

[31] The RPD is an expert tribunal. As such, its findings of fact or of mixed fact and law are reviewable according to a standard of reasonableness. The Board's assessment of the adequacy of state protection is a question of mixed fact and law which must accordingly be reviewed according to a standard of reasonableness. The same is true of the question as to whether an individual faces

persecution in his or her country of origin: *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 420, at para. 199; 2007 FCA 171, at para. 38.

[32] On the other hand, the issues raised by the applicant that pertain to procedural fairness are questions of law. Either the decision-maker has complied with the duty of fairness appropriate in the particular circumstances, or has breached this duty: no deference is due when such an issue is raised. See *A.G. Canada v. Sketchley*, 2005 FCA 404, paras. 52-53.

A) Did the Board Member err in determining that state protection would be available to the applicant?

[33] The Federal Court of Appeal and the Supreme Court of Canada have made it clear that the starting point in assessing the applicant's claim consists in the examination of the adequacy of state protection: *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at p 722; *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, at para. 42. Where state protection is found to be adequate, it is not necessary for the Board to go any further. As the Federal Court of Appeal stated in *Hinzman*:

> The appellants say they fear persecution if returned to the United States. However, to successfully claim refugee status, they must also establish that they have an objective basis for that fear: *Ward* at p. 723. In determining whether refugee claimants have an objective basis for their fear of persecution, the first step in the analysis is to assess whether they can be protected from the alleged persecution by their home state. As the Supreme Court of Canada explained in *Ward* at page 722, "[i]t is clear that the lynch-pin of the analysis is the state's inability to protect: it is a crucial element in determining whether the claimant's fear is well-founded." [Emphasis in original.] Where sufficient state protection is available, claimants will be unable to establish that their fear of persecution is objectively well-founded and therefore will not be entitled to refugee status. It is only

> where state protection is not available that the court moves to the second stage, wherein it considers whether the conduct alleged to be persecutory can provide an objective basis for the fear of persecution…
> See also: *Colby v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 805; *Landry v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 594.

[34] The case law is also to the effect that refugee protection is meant to be a form of surrogate protection to be invoked only in those situations where the refugee claimant has unsuccessfully sought the protection of his home state. Absent a situation of complete breakdown of state apparatus, it should be assumed that the state is capable of protecting a refugee claimant. To rebut the presumption, an applicant must offer "clear and convincing confirmation of a state's inability to protect": *Ward*, at pp. 724-725; *Hinzman*, at para. 44. If an applicant does not provide such clear and convincing evidence, he cannot qualify as a Convention refugee or a person in need of protection. In other words, proof must be adduced that all possible avenues of protection available have been exhaustively sought before claiming refugee status. Speculation that state protection would be inadequate is not sufficient.

[35] That being said, a refugee claimant has the obligation to seek out protection in his home country only if that protection can be said to "reasonably have been forthcoming" (*Ward, supra*, at p. 724). This is not meant to be an easy way out of the requirement that a refugee claimant approach his home country for protection before seeking international refugee protection. As the Supreme Court stated in *Ward* (at p. 724), "…the claimant will not meet the definition of "Convention

refugee" where it is objectively unreasonable for the claimant not to have sought the protection of his home authorities…".

[36] Of course, the burden of the applicant is greater in this case as the country to which she is to be returned is the United States, "a democratic country with a system of checks and balances among its three branches of government", and which "has adopted a comprehensive scheme to ensure those who object to military service are dealt with fairly": *Hinzman*, at paras. 46, 57.

[37] In the present case, the situation is quite distinguishable from the problems raised, before this Court and the Court of Appeal, by a number of recent U.S. Army deserters, and most notably Mr. Hinzman. The Board Member appeared, at times, to have focused on the applicant's status as a conscientious objector. Indeed, he wrote at para. 161 of his reasons:

> It appears to me that the claimant's situation is no different from *Hinzsman's* legal situation because both of them made a formal claim of being a contentious **[*sic*]** objector and a reluctance to engage in combat.

[38] To be fair, it is true that the applicant did mention in the narrative appended to her Personal Information Form (PIF) that she did not know what the phrase "conscientious objector" meant, and that it was not explained to her that one of the forms she was made to sign when she joined the army was a waiver of her right to claim that right.

[39] But it is also equally clear when reading her narrative as a whole and the evidence submitted to the Board that her situation was much different from that of Mr. Hinzman and that her claim was

first and foremost predicated on her sexual orientation. Unlike Mr. Hinzman, she could be punished not only on AWOL and desertion charges, but also for simply being gay. As already mentioned, Article 125 of the Uniform Code of Military Justice still makes it an offense to have sexual relations with a person of the same sex. This fundamental flaw in the Member's reasoning, it seems to me, permeates his entire approach to the case and certainly skewed, at least to some extent, his perception of the nature of the applicant's claim and predicament.

[40] Before weighing the various arguments made by counsel for the applicant, it is worth noting that the Board did not make any adverse credibility findings with respect to the applicant. He found that she was, indeed, a gay person, and there is no suggestion that she faked her sexual orientation to be discharged from the Army. Nor did the Board Member make any unfavourable credibility findings with respect to the harassment and threats that were directed at the applicant while a Member of the United States Army.

[41] It is alleged that the first error made by the Board Member was in his determination that Ms Smith did not seek state protection. The Board Member wrote:

> She alleges she spoke to a sergeant asking permission from him to speak to the First Sergeant to tell him about her being gay and wanting to leave the army.
>
> She did not make any attempts to seek the help of higher authorities in her unit other than the sergeant.
>
> A claimant is required to approach her or his state for protection in situations which protection might reasonably be forthcoming. The claimant must show that it was reasonable for her not to seek protection. When asked why she did not seek protection from higher

> authorities at Fort Campbell, she replied: "]…] I considered it but did not. I felt higher ranking officers were in on it".
>
> She gave no explanation as to why she thought the higher ranking officers were involved. In fact, her evidence is that she tried to find out who wrote the note threatening to kill her in her sleep by comparing the signatures of fellow soldiers to other paperwork the soldiers had signed, but was unable to ascertain with certainty who wrote the note. It was speculation only on her part that higher ranking officers were involved.
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> Reasons for Decision, at paras. 189-192.

[42] Contrary to the situation in *Hinzman*, where the appellants had not made an adequate attempt to avail themselves of the protections afforded by the UCMJ, the applicant in this case provided evidence that she did approach her superiors to try to obtain a discharge. According to the evidence offered by the applicant, she went so far as to ask her superior for permission to speak to a higher authority, but that was denied. She also testified that one superior scoffed at her and said they would figure out the paperwork when she returned from her tour of duty in Afghanistan.

[43] The case law of this Court requires more than one attempt to obtain state protection. It is often said that an applicant must usually follow up on his complaint, and seek assistance from higher authorities if unsuccessful at the first stage. Yet, one must take into account the particular environment that an applicant finds himself in. It is clear that in the Army reigns an atmosphere of unconditional obedience to the hierarchy. The Board Member did not seem to be sensitive to this special context.

[44] Further, the applicant provided evidence that she was afraid that her superiors may have been involved in the harassment and threats targeted at her. She had reasons to perceive her superiors as being the potential authors or participants in the harassment and threats directed at her. She stated in her PIF and in her testimony that she felt that she started receiving harsher treatment from her superiors when they heard rumours that she was a lesbian. Moreover, one of her superiors told her to “tone down her behaviour”, which the applicant believed was a reference to her sexual orientation. Nonetheless, the Board Member found that the applicant’s belief to the effect that higher ranking officers were involved was pure speculation. While such a finding is normally entitled too much deference, it may nevertheless be questioned when the Board Member has not considered all the evidence submitted by the applicant, especially when that evidence has remained uncontradicted.

[45] What is more, the personal experience of the applicant seems to be consistent with the documentary evidence indicating that superiors in the U.S. military are too often complacent and sometimes even actively participate in the harassment and abuse directed at gays and lesbians in the military. This evidence should also have been taken into account by the Board Member in assessing whether the applicant adequately attempted to avail herself of the protection afforded by the state.

[46] This failure to give due consideration to that documentary evidence ties in with two other errors allegedly made by the Board Member and which relate to the willingness of the state to afford protection.

[47] First, counsel for the applicant contended that the Board Member erred in speculating as to the isolated nature of Private Barry Winchell murder, which took place in 1999. This murder was clearly a watershed moment in the long struggle of gay, lesbian and bisexual persons to be fully accepted in the U.S. Army. On July 5, 1999, Private Winchell was brutally beaten to death with a baseball bat while sleeping outside his barracks room at Fort Campbell, Kentucky. Soldiers later testified that Private Winchell had faced daily anti-gay harassment for more than four months prior to his murder, on the basis of rumors that he was gay ("Conduct Unbecoming: Sixth Annual Report on "Don't Ask Don't Tell, Don't Pursue, Don't Harass" by Servicemembers Legal Defence Network, 2000; Exhibit "8" to the applicant's affidavit).

[48] When evaluating the affidavit evidence of Mr. Rehkopf, the Board Member made the following finding:

> 151. Mr. Rehkopf suggests further that because the US Army could not protect Private First Class Barry Winchell, and a host of other gay and lesbian service members who have been subjected to vicious attacks and murder, that this is "clear and convincing" evidence of the state's inability to protect the claimant.
>
> 152. I do not accept his "opinion" as credible. The Winchell murder was no doubt a brutal act but an isolated one. Although Mr. Rehkopf makes no mention as to whether the perpetrator or perpetrators of that act were charged and convicted of killing Winchell. I suspect they must have been and were sentenced to lengthy periods in prison and subjected to other severe penalties.

[49] This was clearly a speculative finding that was not open to the Board Member in the absence of any evidence to support it. The Federal Court of Appeal held, in *Canada (Minister of Employment and Immigration) v. Satiacum*, [1989] F.C.J. No. 505; 99 N.R. 171, that findings

cannot be based upon evidence that is the "sheerest conjecture or the merest speculation". The Court delineated the difference between speculation and reasonable inference by stating:

> The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction, it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference.
> See also: *Hassan Bedria Mahmoud v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 250; 61 A.C.W.S.(3d) 768, at para. 7; *Bains v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1144, at para. 12.

[50] There was simply no evidence before the Board Member to support his finding that the brutal murder of Private Winchell was an isolated incident, or that those who harass, threaten or physically harm or kill gays and lesbians in the military are severely punished. Quite to the contrary, the applicant submitted evidence that was to the opposite effect: namely, that the harassment and violent attacks on gays and lesbians in the Army is systemic and commonplace in the American military, and that immediate supervisors and unit commanders tolerate or are believed to tolerate that behaviour to some extent.

[51] In a report commissioned by the Center for the Study for Sexual Minorities in the Military ("The Practical and Conceptual Problems with Regulating Harassment in a Discriminatory Institution", U. of California, 2004; Exhibit 5 to the applicant's affidavit), to which the Board Member refers extensively in his reasons, it is indicated that the top of the chain of Command at Fort Campbell did not issue a single statement condemning anti-gay conduct following Winchell's

murder, and even denied its existence. This senior ranking officer blamed the increase in gay discharges on gays seeking a means to leave the Army, but was nevertheless promoted to Lieutenant General, the second highest position in the Army. These specific findings are reported by the Board Member at paragraphs 84 and 85 of his reasons.

[52] But it was not sufficient to summarize the evidence presented by the applicant. The Board Member should have addressed that evidence and discussed it in his reasons, and could not content himself with speculations that Private Winchell murder was just an isolated incident. This was all the more important since the applicant had pointed out to the Board Member that she and Private Winchell not only shared a perceived identity in sexual orientation, but that they were both based at Fort Campbell. She also provided evidence that she received threats that she would be beaten with a baseball bat in her sleep, just like Private Winchell. It was incumbent upon the Board Member, in making his finding that Private Winchell's murder was an isolated incident, to indicate why he did not accept evidence to the opposite effect.

[53] This speculative finding of the Board Member is not innocuous. First of all, the evidence offered by the applicant goes a long way to establishing her subjective fear of persecution as well as the threat to her life. That evidence was also crucial to substantiate the objectiveness of her fear, and the ability and willingness of the state to protect her. One must not loose sight of the fact that the applicant could be returned to her unit and face the same threats that she had faced before pending determination of the measures to be taken against her. Accordingly, I am of the view that the Board's failure to explain why this evidence was rejected was material to its decision. It is true that

the Board Member summarized at some length the evidence offered by the applicant, but he has by no means considered it, let alone analyzed it and provided reasons for dismissing it.

[54] The Board Member made a second error when he relied on evidence not before him and failed to give the applicant an opportunity to respond to that extrinsic evidence. Without even mentioning his sources, the Board Member wrote:

> While punishment for desertion can include imprisonment, the evidence indicates that the majority of Army deserters in the United States, for whatever reason, have not been prosecuted or court-martialed and that 94 percent of deserters have been dealt with administratively and merely received a less-than honorary discharge from the military.

[55] This evidence was clearly not before the Board Member, and appears to come directly from the decision of the Federal Court of Appeal in *Hinzman* (at paras. 48 and 58). The respondent submits that the Board could take notice of any generally recognized facts and any information or opinion that is within its specialized knowledge. There are, however, a number of problems with such a line of argument.

[56] First of all, I do not think this is the kind of facts the Board could take "judicial notice" of. The test to determine whether a particular fact can be considered by a court without any proof has been well summarized in the doctrine:

> Judicial notice is the acceptance by a court, without the requirement of proof, of any fact or matter that is so generally known and accepted in the community that it cannot be reasonably questioned, or any fact or matter that can readily be determined or verified by resort to sources whose accuracy cannot reasonably be questioned.

> […]
> Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of the facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.
> Paciocco & Stuesser, *The Law of Evidence*, 4th ed., Toronto, Irwin Law, 2005, at p. 376.

[57] While rules of evidence must be relaxed before administrative tribunals, I do not believe that this should be taken as license to accept in evidence controversial facts that have not been argued at all, especially when these facts can be of material significance for the outcome of a case of such vital importance for an applicant. The assertion that 94 percent of deserters have been dealt with administratively is not "clearly uncontroversial or beyond reasonable dispute". Nor is it a fact that "is so generally known and accepted in the community" or can "readily be determined or verified" by indisputable sources.

[58] Assuming that this kind of information could be considered within the specialized knowledge of the Board, the applicant should have been advised that the Board intended to use that knowledge and be given an opportunity to respond. Rule 18 of the *Refugee Protection Division Rules* (S.O.R./2000-228) provides as follows:

Notice to the parties	Avis aux parties
18. Before using any information or opinion that is within its specialized	**18.** Avant d'utiliser un renseignement ou une opinion qui est du ressort de sa

knowledge, the Division must notify the claimant or protected person, and the Minister if the Minister is present at the hearing, and give them a chance to	spécialisation, la Section en avise le demandeur d'asile ou la personne protégée et le ministre — si celui-ci est présent à l'audience — et leur donne la possibilité de :
(*a*) make representations on the reliability and use of the information or opinion; and	*a*) faire des observations sur la fiabilité et l'utilisation du renseignement ou de l'opinion;
(*b*) give evidence in support of their representations.	*b*) fournir des éléments de preuve à l'appui de leurs observations.

[59] Commenting on this Rule, this Court wrote in *Isakova v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 149, at para. 16:

> The purpose of Rule 18 is to enable a claimant to have notice of the specialized knowledge and to give him or her the opportunity to challenge its content and use in reaching a decision. Therefore, in order for Rule 18 to be effective, the RPD member who declares specialized knowledge must place on the record sufficient detail of the knowledge so as to allow it to be tested. That is, the knowledge must be quantifiable and verifiable.
> See also: *Habiboglu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1664; *Sadeghi-Pari v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 282; *Panuk v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1187.

[60] In the case at bar, the Board Member did not give notice to the applicant that he had specialized knowledge with regards to the fact that 94 per cent of deserters are dealt with administratively, and that he intended to rely on that information. He did not provide the source of that information either, and the applicant was not afforded an opportunity to respond thereto.

[61] In any event, I do not think that this particular information can be characterized as falling within the specialized knowledge of the Board. The explanation, it seems to me, is more prosaic: the Board Member simply "lifted" a finding made in a previous decision. This is clearly not acceptable, as it is well established that a finding of fact must always based on the evidence submitted to the decision-maker. As this Court has repeatedly stated, each case must be decided on its own facts. Nowhere is this rule clearer than in matters pertaining to state protection. It has been held time and again that it cannot be conclusively determined, on the basis of previous findings of state protection (or lack thereof) pertaining to a particular case, that state protection exists or does not exist in a particular country. The correct approach has been expressed as follows:

> Second, it was not sufficient for the Board to simply "refer" to an earlier decision of the Board for its state protection analysis. The RPD may, as a matter of law, adopt another panel's analysis or conclusion, but as I wrote in *Olah* v. *Canada (Minister Citizenship and Immigration)*, [2001] F.C.J. No. 623, at paragraph 25, a panel cannot blithely incorporate findings of fact from other cases. In *Badul* v. *Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 440, at paragraph 25 my colleague Mr. Justice O'Reilly wrote that reliance upon the findings of another panel must be "limited, careful and justified". In *Ali v. Canada (Minister Citizenship and Immigration)*, [2004] F.C.J. No. 1755, I found that the RPD could adopt the reasoning and findings of another case with respect to similarly situated people in Pakistan where satisfied that the facts and evidence regarding country conditions in the earlier case were sufficiently close to the facts and evidence before the RPD in the second case.
> *Shahzada v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1176, at para. 6. See also: *Hassan v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 601, at paras. 6-7; *Santiago v. Canada (Minister of Citizenship and Immigration)* 2008 FC 247; *Arellano v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1265.

[62] It is worth pointing out that in *Hinzman*, counsel for the appellant disputed the statistics relating to punishment for deserters on the basis that they were compiled prior to the commencement of the most recent U.S. military action in Iraq. The Court of Appeal nevertheless accepted the evidence indicating that the vast majority of Army deserters had not been prosecuted or court-martialed because the appellants could not point to any contrary evidence. The Court was also of the view that there was reason to believe the statistics would not have changed materially following the outbreak of the war, since it is in the best interests of the military to accommodate those who object to combat as they may be ineffective at best and are likely to spread their beliefs among their colleagues.

[63] In the present case, the applicant submitted documentary evidence revealing sentencing disparities for those convicted of desertion and going AWOL (Exhibit 18 to the affidavit of the applicant). As well, the applicant offered evidence that the military was not discharging those identifying themselves as gay or lesbian at the same rates as in the past, including a chart showing recent statistics indicating a significant decrease in discharges of gays and lesbians since 2001, as well as documentary evidence explaining that such decrease was due to the need for more personnel for the wars that the United States is engaged in. Not only does this evidence tend to refute the finding in *Hinzman*, but it also addresses a different fact situation than that examined in that case.

[64] In the light of the evidence that was before him and that had not been offered in *Hinzman*, and considering that the applicant was claiming refugee status not on the basis of her conscientious objection to the war but on the ground of her sexual orientation, the Board Member could not

merely base his decision on a finding made in another context. It was incumbent upon him, at the very least, to provide reasons as to why he nevertheless adopted that finding and discounted the evidence tending to invalidate it submitted by the applicant. I therefore find that the Board Member came to an unreasonable conclusion since he followed blindly a finding taken from another decision and grounded on a completely different evidentiary basis.

[65] In view of these two errors (speculating about the isolated nature of Private Winchell murder and following a finding in *Hinzman* that 94 per cent of deserters are dealt with administratively), the argument that speculation is not enough when claiming that state protection could not reasonably have been forthcoming cannot defeat the applicant's claim. In *Hinzman*, it will be remembered, the Court held that no evidence had been offered to establish that the appellants would not be afforded the full protection of the law. In the case at bar, while the applicant had (according to *Hinzman*) a heavy burden of proof with respect to the presumption that the United States is capable of protecting her, she did provide evidence (both in her own affidavit and testimony and in a plethora of documents) in support of her allegations.

[66] As a result, I am of the view that the Board Member erred in two respects in determining whether the applicant had an objective basis for her fear of persecution. First, he did not take fully into account the evidence pertaining to the situation of gays and lesbians in the U.S. Army in order to determine whether the applicant made an adequate attempt to avail herself of the protection afforded in her country. Second, the Board Member erred in weighing that evidence, and thus drew two unwarranted conclusions therefrom. These two errors were material in the Board Member’s

decision. Even assuming the applicant could have pursued further her request to be discharged, it was still open to her to demonstrate that she could not be required to seek out state protection since it was unlikely to be forthcoming. In failing to properly assess the evidence before him, the Board Member precluded that line of reasoning.

> B) Did the Board Member err in finding that the applicant would be submitted to prosecution and not to persecution?

[67] Although not required to do so, in view of his ruling as to the adequacy of state protection, the Board Member nonetheless did proceed to examine the applicant's claim that the application of the Uniform Code of Military Justice upon her return to the United States would result in persecution. To establish this claim, the applicant had to show that the relevant provisions of the UCMJ would be applied to her in a discriminatory fashion or would result in cruel and unusual punishment or treatment.

[68] To support her allegations in this respect, the applicant relied principally on the affidavit of Mr. Rehkopf, an attorney at law who had 32 years of military law experience both as prosecutor, defence counsel and acting Staff Judge Advocate. Yet, after reviewing Mr. Rehkopf's evidence (with which he disagreed on a number of points), the Board Member questioned his credibility in the following manner:

> 173. I find of interest that Mr. Rehkopf states in his affidavit that he entered active duty in the Air Force in 1976 as a Judge Advocate;
>
> > "[…] that he served in active duty from 1976 to 1981 as an Assistant Staff Judge Advocate […] and he has 32 years "military law experience" as a prosecutor, defense counsel and Acting Staff Judge Advocate. He has tried in excess of

> 225 cases to a verdict. The majority of them being military courts-martial […]"
>
> 174. He does not indicate how many times he acted as the prosecutor in those 225 plus cases. If Mr. Rehkopf was so concerned about the inequities of the military justice system in so far as it relates to homosexuality in the armed forces, one wonders why, if he acted as a prosecutor in such military claims, that he was able to control his emotions or continue on with those prosecutions of deserters (assuming that some of the members included issues of homosexuality) in light of what he now says about the injustices and Draconian sentences handed out by the Court-Martial judges in situations in which the claimant now finds herself in.

[69] This unfavourable finding as to credibility is problematic in a number of ways. The respondent is correct to point out that Mr. Rehkopf was not qualified as an expert by the Board, and had no firsthand knowledge of the applicant or of her exact circumstances. That being said, I am of the view that his affidavit was not just a lay opinion which the board could reject without providing reasons for doing so. Mr. Rehkopf obviously had a long experience as a military lawyer and has acted as defense counsel, prosecutor and judge for many years. It was open to the Board, of course, to prefer other evidence to that provided by Mr. Rehkopf. The problem is that the Board Member discounted his experience and expertise without providing reasons or referring to adverse evidence. Indeed, there was no evidence whatsoever before the Board refuting the evidence of Mr. Rehkopf.

[70] The Board Member aptly noted that Mr. Rehkopf made some assumptions in his affidavit which must be dismissed as speculative. This is a fair comment, although he offered only one single example of such an assumption. It might have been helpful if he had specified those other assumptions which he found unwarranted, as there is obviously a fine line between offering an

opinion and making unsubstantiated assumptions. Moreover, the Board Member himself engaged in speculation (when he stated that the murder of Private Winchell was an isolated act) to attack Mr. Rehkopf's credibility. Similarly, he seemed to assume that the "Don't Ask, Don't Tell" policy, if challenged, would be declared unconstitutional. Not only is this assumption, at best, highly questionable (the Board Member offers no legal analysis to support that view), but it is irrelevant to determine how the applicant would be treated, in the meantime, if returned to the United States. Finally, he quoted from a newspaper article published after the hearing, according to which President Obama was expected to repeal the "Don't Ask, Don't Tell" policy, and inferred that this would "sweep away" most if not all of the ammunition presently used by prosecutors in U.S. court-martials in situations similar to those the applicant finds herself in. Once again, this reference was totally inappropriate as it was purely speculative and did not change the law as it stood at the time the Board Member rendered his decision.

[71] The only reason provided by the Board Member to dismiss Mr. Rehkopf's affidavit is the apparent inconsistency between the position he now takes and the fact that he worked as a prosecutor in cases of desertion. While this may validly raise questions as to the motives underlying Mr. Rehkopf's testimony, it is not sufficient, in and of itself, to undermine his opinions. In fact, one could even argue that it makes his opinion all the more compelling, since he had the advantage of seeing firsthand not only what the black-letter law is but how it operates in practice. Mr. Rehkopf was never cross-examined on his affidavit, and so we will never know how he reconciled the views expressed in his affidavit with his past work experiences. It may well be, for example, that he never had to deal personally with prosecutions of deserters involving issues of homosexuality, contrary to

the groundless assumption made by the Board Member. I am therefore of the view that this attack on his credibility was totally inappropriate, and was based, at least in part, on pure speculation.

[72] Counsel for the respondent suggested that the opinion of Mr. Rehkopf was dismissed because he did not exhibit the degree of impartiality and objectivity necessary to render his testimony reliable, assuming instead the role of an advocate. Using the same example as the Board (i.e. Mr. Rehkopf's assumption that the applicant will not be paid for a considerable time because her pay records will have been "lost" and that she would be treated worse than drug dealers), counsel argues that Mr. Rehkopf's affidavit is that of an advocate as it is replete with speculations and conjectures.

[73] Having read carefully the affidavit of Mr. Rehkopf, I am not prepared to go that far. As previously mentioned, it is the role of an expert to offer an opinion on the basis of inferences drawn from the facts. Of course, the accuracy and reliability of the underlying facts on which the opinion is based will be crucial in determining the weight to be given to expert evidence. In the case at bar, the Board Member not only found the applicant's story credible, but failed to refute the facts upon which the opinion of Mr. Rehkopf was based by referring to adverse evidence. While some comments made by Mr. Rehkopf could properly be given little weight as they verged on advocacy, this was clearly not sufficient to justify the outright rejection of his affidavit altogether.

[74] There is another, perhaps more fundamental, problem with this argument. Nowhere in his reasons did the Board Member offer such an explanation for rejecting Mr. Rehkopf's evidence. It is

trite law that on judicial review, it is the reasons provided by the Board that are to be reviewed; there is no room for *ex post facto* rationalization of the decision offered by the party wishing to have that decision upheld.

[75] The same can be said with respect to the further argument made by the respondent that Mr. Rehkopf's opinion constituted a pronouncement on the questions that were to be ruled on by the Board, such as the availability of state protection and persecution versus prosecution. The Board Member quite correctly remarked that it was for him, and not for Mr. Rehkopf's, to draw the line between prosecution and persecution in the application of the UCMJ. Similarly, it was open to him to find that, as a law of general application, the UCMJ is applied in a non-discriminatory fashion and to reject Mr. Rehkopf's opinion in that respect. But nowhere did he write that he dismissed the affidavit in its entirety because Mr. Rehkopf expressed an opinion on the mode of application of domestic law. Indeed, that would have been excessive.

[76] Mr. Rehkopf did not offer an opinion as to whether the applicant is a refugee under Canadian law. He did not purport to state categorically that the applicant would be persecuted if she were to return to the United States either. Quite to the contrary, he acknowledged that it is not an easy task to draw the line between prosecution and persecution, and simply described the situation that she would likely face when she returned (see pp. 20 and 21 of his affidavit, Exhibit 20 of the applicant affidavit). He also offered his opinion, based on American, Canadian and European law, that the situation that Ms. Smith would face due to her sexual orientation is of the sort condemned by the international community as contrary to basic rules of human conduct. I fail to see how these

views stray from the appropriate purview of expert opinion. Mr. Rehkopf stayed clear of expressing an opinion on the ultimate question to be ruled on by the Member.

[77] As for the views he expressed with respect to the decisions of this Court and the Federal Court of Appeal in *Hinzman*, they were not inappropriate either. It is true that domestic law is not a subject about which a Canadian court will receive opinion evidence: see *R. v. Graat*, [1982] 2 S.C.R. 819; *Ugbazghi v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 694, at para. 27. But that is not what Mr. Rehkopf did in his affidavit. He was well aware of that danger, and he went out of his way to emphasize that he was not attempting to provide legal advice concerning Canadian law (see footnote 11 of his affidavit). In fact, he purported to apply the requirements spelled out in *Hinzman* with respect to state protection, and merely rejected the view that the UCMJ, even though it is in theory a law of general application, is always applied in a non-discriminatory fashion, first because the black-letter law is one thing and the application thereof may be a quite different one, and second because it only applies to persons having actual military status. These are opinions as to facts that do not detract from the legal principles espoused by this Court and the Court of Appeal in *Hinzman* and that he was entitled to make on the basis of his experience and expertise in American military law.

[78] Having dismissed the evidence presented by Mr. Rehkopf, the Board Member cited the decision of the Federal Court of Appeal for the proposition that the UCMJ is a law of general application that is applied in a non-discriminatory fashion, and also found that there was no credible evidence that the applicant would not receive a fair hearing upon her return to the United States.

Considering the evidence that was before him, I do not think that this was a finding that was reasonably open to him.

[79] The duty of the Board was to determine whether the applicant would face persecution should she be returned to her country. Paragraph 167 of the UNHCR Handbook states that "[f]ear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition". But paragraph 168 goes on to say:

> The person is clearly not a refugee if his only reason for desertion or draft-evasion is his dislike of military service or fear of combat. He may, however, be a refugee if his desertion or evasion of military service is concomitant with other relevant motives for leaving or remaining outside his country, or if he otherwise has reasons within the meaning of the definition, to fear persecution.

[80] One of the exceptions outlined by the Handbook is found at paragraph 169 and refers to an applicant who can establish some form of discriminatory mistreatment before, during or even after military service. The Federal Court of Appeal implicitly referred to that exception in *Hinzman*, at paragraph 31:

> Finally, the Board considered whether the punishment the appellants would face upon return to the United States would amount to persecution. To establish this claim, the Board indicated that the appellants would have to show that the relevant provisions of the U.S. Uniform Code of Military Justice ("UCMJ") would be applied to them in a discriminatory fashion or would amount to cruel or unusual treatment or punishment.

[81] In that case, the Court of Appeal eventually held that the UCMJ is a law of general application applied in a non-discriminatory fashion. But that finding was made in a context where

there were many provisions and procedural safeguards designed to ensure that conscientious objectors can claim exemptions from military service or alternatives to combat, as is made clear at paragraph 47 of that decision.

[82] The applicant's claim is not simply that she is a conscientious objector and that she will be punished if she returns. At the heart of the applicant's claim is that she is a lesbian member of the U.S. Army, who was harassed and threatened at the same base where a gay member of the Army was beaten to death, and who feels she could not rely on her superiors to secure protection. She fears that she could be punished for leaving an environment where her life is in danger.

[83] The duty of the Board Member was to determine whether she would suffer persecution as a result of the relevant substantive law or of the process whereby the law would be applied to her. It was not enough for the Board Member to state that he is "not in a position to defend or criticize". It is part and parcel of the assessment of a refugee claim to determine whether a claimant has a well-founded fear of persecution for reasons, *inter alia*, of her membership in a particular social group, if he/ she is returned to his/her home country.

[84] The applicant provided evidence to the Board that the punishment she would be exposed to under the court-martial process relates to a breach of a law that is in conflict with a fundamental human right and therefore adversely differentiates on a Convention ground in its application. In particular, the applicant is at risk of being court-martialed for the following crimes: "Absent Without Leave", "Desertion", "Desertion to avoid hazardous duty" and/or "Indecent Act" (for

engaging in homosexual behaviour) punishable under the UCMJ. Yet, there was evidence before the Board Member that the Supreme Court of the United States has declared unconstitutional a state statute making it a crime for two adults of the same sex to engage in consensual "sodomy". The UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity (Exhibit 35 of the applicant's affidavit) also provides that acts of physical, sexual and verbal abuse and discrimination against gays and lesbians, when they go unpunished, may form the basis of a refugee claim. Similarly, this Note adds that "[b]eing compelled to forsake or conceal one's sexual orientation and gender identity, where this is instigated or condoned by the State, may amount to persecution" (at para. 12). This evidence could not simply be ignored by the Board Member and had to be properly discussed and analyzed before he could conclude that the UCMJ was a law of general application and applied in a non-discriminatory fashion.

[85] The Federal Court of Appeal has also recognized that an applicant may qualify as a Convention refugee even if it is ruled that a law is prima facie of general application. This might be the case, for example, if the law is selectively applied, or if the punishment or treatment provided for in a law of general application is out of all proportion to the objective of the law: see *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314, at paras. 16-17. The recent decision of this Court in *Rivera v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 814, provides a useful and vivid illustration of this principle. Accordingly, the Board Member could not ignore the evidence suggesting unequal treatment for homosexuals before court-martials, both in the exercise of the discretion to prosecute and in the sentencing. Similarly, there was evidence both in the documentation before the Board Member and in the affidavit submitted by Mr. Rehkopf to the

effect that military judges are not independent as they are part of the chain of command and depend upon superior officers for promotions and subsequent assignments, that convening authorities determine whether a member of the military will be prosecuted and select potential jurors, and that there is no uniform or consistent method by which sentences are imposed on military personnel convicted of AWOL or desertion. While these assertions appear to contradict the findings of the Board and of the Federal Court of Appeal in *Hinzman*, it must be remembered that these findings of fact were made on the basis of the evidence that was submitted by the parties in that case. In fact, the Court of Appeal noted in *Hinzman* (at para. 49) that there was no evidence before the Board to the effect that the military judges are not independent or that the procedure by which the law would be applied to the applicant is discriminatory. Furthermore, *Hinzman* was decided in the specific context of a claim based on conscientious objection and not on sexual orientation. It was therefore the duty of the Board Member to assess the fairness of the court martial process in the light of the particular set of facts and of the evidence that was before him.

[86] Pausing there, it seems to be commonly assumed to be inappropriate for this Court, or for that matter any other Canadian court or administrative tribunal, to rule on the constitutionality of a foreign statute or its compatibility with our own *Charter of Rights and Freedoms.* However, there is authority for the proposition that a national court can indeed rule on the constitutionality of a foreign statute, when proper evidence has been adduced either supporting or attacking the validity of a statute, and when the issue of constitutionality arises incidentally in the course of the litigation: see *Estonian Cargo and Passenger S.S. Line v. S.S. Elise and Messrs. Laane and Baltser*, [1948] Exch. C.R. 435, at 451; and more recently *Hunt v. T&C plc*, [1993] 4 S.C.R. 289, at paras. 28-32. In the

case at bar, the issue of the constitutionality of the relevant provisions of the UCMJ has not been argued by the parties. Moreover, the resolution of that question is not necessary to the disposition of this case in a judicial review context. I shall therefore refrain from making a ruling on that question. That being said, even if restraint is called for when it comes to the constitutionality of foreign legislation, the Board nevertheless had a duty to determine whether the UCMJ was, even though it is prima facie a law of general application, enforced in a non-discriminatory fashion in the United States, both substantively and procedurally.

[87] As a result of the foregoing, I come to the conclusion that the Board Member erred in finding not only that the applicant had failed to present clear and convincing proof of the inability of the United States to protect her, but also that she had not met her burden of establishing a serious possibility of persecution on a Convention ground or that it is more likely than not that she would be tortured or face a risk to her life or risk of cruel and unusual treatment or punishment upon return to the United States. In view of the cumulative effect of the Board Member's errors in the assessment of the evidence that was before him, his conclusions are unreasonable.

[88] The applicant has proposed the following two questions for certification:

> i. Where an Applicant requests the Board Member to evaluate evidence rebutting the presumption that the judicial process or laws the Applicant would be subject to in her home country are not laws of general application and therefore persecutory, does the Board Member have an obligation to address it when making findings of state protection?
>
> ii. Does the Board Member have an obligation to provide an analysis supported by evidence that trained, professional observations brought to the Board by an expert are not credible?

[89] It is to be noted that the applicant proposes these questions only in the event she is unsuccessful in her judicial review. I agree with the respondent that this is a highly unusual and inappropriate way of proceeding; if a question is truly a question of general importance determinative of an appeal, its certification should not hinge upon the success or failure of one of the parties.

[90] That being said, the rationale offered by the applicant in support of the certification of her two proposed questions reads more like a further argument on the application for judicial review than as a true justification for bringing these issues to the Court of Appeal. As I have already canvassed in my reasons all the points raised by the applicant in her submissions relating to these proposed questions, no additional comments are called for. Suffice it to say that they do not meet the criteria set out in *Canada (Minister of Citizenship and Immigration) v. Liyanagamage* (1994), 176 N.R. 4. As for the distinction between prosecution and persecution and the issue whether a given law that is *prima facie* of general application is in fact susceptible of discriminatory enforcement, the law has already been expounded by the Federal Court of Appeal in a number of decisions and need not be revisited in the context of the case at bar. What makes this case somewhat unusual is not so much the legal principles at stake, but the facts on which it turns. As such, the proposed questions are not of the kind that transcends the interests of the immediate parties. For this reason, I decline to certify them.

ORDER

This application for judicial review is allowed. No question of general importance is certified.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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